No. 10538

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

vs.

W. S. D. SMITH,
Appellant.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT
W. S. D. SMITH

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I. STATEMENT OF JURISDICTIONAL FACTS

The bill of complaint filed by the appellee is a suit of a civil nature brought by the United States of America as Plaintiff, in an action upon a judgment secured in a penal proceeding, and the matter in controversy exceeds exclusive of interest and cost the sum of Three Thousand ($3000.00) Dollars.

Jurisdiction on the United States District Court rests upon Article III of Section II Clause 1 of the United States Constitution and Judicial Code Section 24 as amended.

Notice of appeal was timely filed and the requirements of the rules complied with. The jurisdiction of

the United States Circuit Court of Appeals depends upon the Judicial Code Section 128 as amended.

II. STATEMENT OF THE CASE

The appellant, W. S. D. Smith, was convicted with other defendants on February 29th, 1924, in the United States District Court of California upon an indictment charging conspiracy to violate the United States Custom Laws and the National Prohibition Act, and on other substantive counts charging law violations. All of the counts appear in the transcript (Tr. 10). On April 25th, 1924, Smith was sentenced to serve two years in prison and to pay a fine of Ten Thousand ($10,000.00) Dollars. On each of the other counts, he was fined one ($1.00) Dollar. The judgment provided in connection with the fines that "the defendant should be committed to the United States until said fine be paid (Tr. 25)." Thereafter execution was issued on the judgment in California and the amount of Fifty-one and 35/100 ($51.35) Dollars was realized thereon. Smith served his penitentiary sentence and being without funds executed the pauper's oath and served an additional thirty days and was then discharged from custody. Thereafter, Smith migrated to Seattle in 1928 and became and is now a permanent resident thereof. No further action was taken on the judgment until nearly seventeen years after its entry, when this action was commenced. It was filed at Seattle on April 1st, 1941. It is the contention of the appellant that under the laws of the United States, the State of California and the State of Washington, the judgment cannot be enforced be-

cause of the limitations provided for in the statutes. It is further suggested that it would be inequitable for the government to be permitted to recover Judgment and have execution upon the property acquired by a party after he has paid the penalty for his violation.

III. SPECIFICATIONS OF ERROR

1. The Court erred in failing to apply to the cause of action the limitations on suits for penalties and forfeiture provided in Title 28, U.S.C.A. 791.

2. The Court erred in failing to apply the Statutes of the State of Washington to the cause of action.

3. The Court erred in failing to hold the action was extinguished or limited by the laws of California.

4. The Court erred in holding certain cases govern the cause of action.

5. The Court erred in ruling that a fine was not a penalty.

6. The Court erred in entering Judgment against appellant.

The foregoing are the substance of the statement of the points relied upon by appellant (Tr. 40).

IV. SUMMARY OF THE ARGUMENT

This action is based on a judgment seventeen years old. The laws of the United States forbid suits or prosecutions for penalties for forfeiture, pecuniary or otherwise, accruing under the laws of the United States unless the same is commenced within five years, and the fine imposed by the judgment is a penalty, and the fact that it was reduced to a judg-

ment in California does not alter its character. The laws of California prohibit actions upon a judgment of any court of the United States to five years and actions upon penalties to one year. The laws of the State of Washington limit actions upon any judgment to a period of six years, and further provide that at the expiration of six years, the lien of any judgment shall cease. The rules of court for the Western District of Washington adopt the laws of the State of Washington in connection with judgments and the General Rules for District Courts also adopt such state statutes. The United States statute 569 provides the method by which fines may be collected and enforced and provides that the same may be enforced by execution in like manner as judgments in civil cases are enforced. There are no provisions for renewal of judgments. The several Statutes of Limitations were raised by defendant's answer. It is the contention of the appellant that the defendant has satisfied the terms of the penal judgment by service of two years in prison and by the application of all property he had at the time to satisfaction of the fine, and further satisfied the judgment by the service as a pauper of the additional thirty days required by law. It is to be noted the government makes no claim that the appellant was not a pauper at the time of his release (Tr. 8). We believe that the government is not now entitled at this late date to demand from the appellant property he has accumulated since his release from prison which is not connected in any way with his original dereliction. As the basis for this statement, we quote in the classic words of Chief Justice Marshall, "This would

be utterly repugnant to the genius of our laws. In a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture."

V. ARGUMENT ON THE MERITS

We believe that the following statute is controlling upon the court:

> "No suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, shall be maintained, except in cases where it is otherwise specifically provided, unless the same is commenced within five years from the time when the penalty or forfeiture accrued."
>
> Title 28, U.S.C.A., Sec. 791.

The specifications of error are so interwoven, we find it difficult to find a dividing line between them, and we find it necessary to discuss them generally, but we have endeavored to separate some of the various points.

It is apparent that if this action is for a penalty or forfeiture, then the government cannot maintain it. There can be no question that the term "penalty" has from the beginning of our jurisprudence involved the idea of punishment for infraction of law and is commonly used to describe the method by which laws are enforced against wrongdoers. In our opinion, if the sentence imposed read a penalty of $10,000.00, it would be just the same punishment as "a fine of $10,000.00," because as we will show later, the word

penalty includes a fine, and to attempt to say the statute quoted, is not applicable, is to say that it is not a penalty. The term penalty is so all inclusive that it would be as proper to argue that a part is not a component part of the whole, although the whole is the sum of the parts; or that the chemical compounds which made up a product are not included in the product as to say even to the layman that a fine is not a penalty of the law.

Is a Fine a Penalty or Forfeiture?

In support of our position that a fine is a penalty, we quote the following:

> "The term penalty in its broadest sense includes all punishment of whatever kind and in its broadest sense it is a generic term which includes fines as well as other kinds of punishment. * * * While a fine is always a penalty, a penalty is not always a fine."
>
> 36 C.J.S. 781, 782.

We cite the following additional definitions for the Court's consideration:

> *Penalty*: "A sum, also called a fine, recoverable in a court of summary jurisdiction from a person infringing a statute; a sum recoverable by action from person infringing a statute."
>
> Wharton Law Lexicon (14th ed.) p. 751.
>
> "The terms 'fine,' 'forfeiture' and 'penalty' are often used loosely and even *confusedly*, but when a discrimination is made, the word 'penalty' is found to be *generic* on its character including both fine and forfeiture." (Italics ours)
>
> Black's Law Dictionary (3rd ed.) p. 1345.

Chief Justice Marshall has clearly made and defined the matter in the following observation:

> "Almost every fine or forfeiture under a penal statute, may be recovered by an action of debt as well as by information; and to declare that the *information was barred while action of debt was left without limitation*, would be to attribute a capriciousness on this subject to the legislature, which could not be accounted for; and to declare that the law did not apply to cases on which an action of debt is maintainable, would be to overrule express words, and to give the statute almost the same construction which it would receive if one distinct member of the sentence was expunged from it. In the particular case, the statute which creates the forfeiture does not prescribe the mode of demanding it; consequently, either debt or information would lie. It would be singular if the one remedy should be barred and the other left unrestrained." * * *
>
> "In expounding this law, it deserves some consideration, that if it does not limit actions of debt for penalties, those actions might, in many cases, be brought at any distance of time. This would be utterly repugnant to the genius of our laws. *In a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture.*" (Italics ours)
>
> *Adams v. Woods*, Cranch 2 (U.S.) 336, 2 L. ed. 297.

We might observe that if the government's contention is correct, the appellant having been punished by imprisonment for his unlawful actions would continue

for his lifetime liable to the United States for his fine. This would in reality, because of the continuing economic burden, be more severe than the loss of liberty for a period.

Justice Lamar, in answering to a certificate of division of opinion from the Circuit Court as to whether a crime was included in a definition, made a pertinent observation:

> "The only ground upon which the correctness of this interpretation may be doubted is, that the words 'penalty,' 'liability' and 'forfeiture' do not apply to crimes and the punishments therefor, such as we are now considering. We cannot assent to this. These words have been used by the great masters of Crown Law and the elementary writers as synonymous with the word punishment, in connection with crimes of the highest grade. Thus, Blackstone speaks of criminal law as that 'branch of jurisprudence which teaches of the nature, extent and degrees of every crime, and adjusts to it its adequate and necessary penalty.' Alluding to the importance of this department of legal science, he says: 'The enacting of penalties to which a whole nation shall be subject should be calmly and maturely considered.' Referring to the unwise policy of inflicting capital punishment for certain comparatively slight offenses, he speaks of them as 'these outrageous penalties,' and repeatedly refers to laws that inflict the 'penalty of death.' He refers to other Acts prescribing certain punishments for treason as 'Acts of pains and penalties.' "
>
> *U. S. v. Reisinger*, 128 U.S. 398, 32 L. ed. 480.

Even when the word "tax" has been used, but the

intent is a penalty, the court has recognized the penal character of the action and observed:

> "* * * A tax is an enforced contribution to provide for the support of government; as the word is here used, is an exaction imposed by statute as punishment for an unlawful act. The two words are not interchangeable, one for the other. *No mere exercise of the art of lexicography can alter the essential nature of an act or a thing; and if an exaction be clearly a* penalty it cannot be converted into a tax by the simple expedient of calling it such. That the exaction here in question is not a true tax, but a penalty involving the idea of punishment for infraction of the law, is settled by *Lipke v. Lederer*, 259 U.S. 557, 561, 562, 66 L. ed. 1061, 1064, 1065, 42 S. Ct. 549.
>
> "See also *Regal Drug Corp. v. Wardell*, 260 U.S. 386, 67 L. ed. 318, 43 S. Ct. 152.
>
> "* * * *But an action to recover a penalty for an act declared to be a crime, is, in its nature, a punitive action; and the word 'prosecution' is not inapt to describe such an action.*" (Italics ours)
>
> *United States v. LaFrance*, 282 U.S. 568, 75 L. ed. 551.

It is not out of place to observe that this action is the first brought by the government in this district, or in any other district so far as our search has been able to ascertain, and the government until now has apparently interpreted the limitation statute on penalties as applying to cases of this character. We state this opinion because of the thousands of cases created during the prohibition period when many fines

and penalties were imposed and yet, we are unable to find an adjudicated case wherein the government has sought to recover on it after the five year period.

We might at this point observe that this is a civil action for debt although the criminal action upon which it is based, was complete within itself.

In a case where the government attempted to ground an action for a debt upon a smuggling statute, relief was denied in the following language:

> "That Act contemplated a criminal proceeding, and not a civil action of debt. It imposed a penalty for receiving, concealing, buying, selling or in any manner facilitating the transportation, concealment or sale of goods illegally imported. *The penalty was a fine* on conviction, not exceeding $5,000.00 nor less than $50.00, or imprisonment, or both, at the discretion of the court. It is obvious, therefore, that its provisions cannot be enforced by any civil action, certainly not in an action of debt." (Italics ours)
>
> *United States v. Claflin*, 97 U.S. 546, 24 L. ed. 1082.

In the cited case, the court further said, in referring to imprisonment which has been added to the new statute, the following:

> "The latter statute imposed a greater penalty and added imprisonment for the same offense."

The only difference in the cited case and the situation of the appellant appears to be that the government is now endeavoring to use the old criminal proceeding to base a new action of debt, instead of grounding it upon the criminal statute.

A Fine Is Always a Penalty Although a Penalty Is Not Always a Fine.

Penalty is a generic term, it has been applied to civil and criminal proceedings. It has been held to include both fine and forfeiture, but it generally has been understood as an exaction demanded by the state for an infraction of its laws. The father of our jurisprudence placed it in the criminal branch and the profession generally has spoken of the "Penalty of the law" when referring to the punishment inflicted upon a wrongdoer. A fine certainly is punishment. Imprisonment is also punishment. The appellant was sentenced to these penalties. How can it be said which part of his sentence was a penalty and which part was not penalty. The Judgment was his penalty. We do not desire to burden the Court with extensive quotations, but content ourselves with the following cases which support our contention that "a fine is always a penalty, although a penalty is not always a fine."

Lipke v. Lederer, 259 U.S. 557, 42 S. Ct. 549, 66 L. ed. 1061;

Regal Drug Corp. v. Wardell, 260 U.S. 386, 43 S. Ct. 152, 67 L. ed. 318;

Huntington v. Attrill, 146 U.S. 657, 13 S. Ct. 224, 36 L. ed. 1123;

St. Louis, I. M. & S. R. Co. v. Williams, 251 U.S. 63, 40 S. Ct. 71, 64 L. ed. 139;

Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198;

Nash v. United States, 229 U.S. 373, 33 S. Ct. 780, 57 L. ed. 1232;

Life & Casualty Ins. Co. v. McCray, 291 U. S. 566, 78 L. ed. 987;

U. S. v. Constantine, 296 U.S. 287, 80 L. ed. 233;

United States v. Smith, Kline & French Co. (D.C.) 184 Fed. 532;

U. S. v. Springer & Lotz, 4 F. Supp. 253;

Schick v. U. S., 195 U.S. 65, 49 L. ed. 99;

U. S. v. Tsokas, 163 Fed. 129;

U. S. v. Moore, 11 Fed. 248;

State ex rel. Jones v. Howe (Mo.) 166 S. W. 328;

State v. McConnell (N.H.) 46 Atl. 458;

State v. Rose (Kan.) 97 Pac. 788;

Barkers Trust Co. v. State (Conn.) 114 Atl. 104;

U. S. v. Atlantic Fruits Co., 206 Fed. 440;

Poindexter v. State (Tenn.) 193 S.W. 126;

State v. Liggett & Myers Tobacco Co. (S. C.) 172 S.E. 857;

In re Dearborn Mfg. Corporation, 18 F. Supp. 763;

Senate Club v. Viley, 12 F. Supp. 982.

Statutes of Limitation in California and Washington Prohibit the Action.

The Chase California Code of Civil Procedure (1937) Part 2, Title 2, Chap. 3, Sec. 336, requires commencement of actions as follows:

> "Within five years: An action upon a judgment of any court of the United States or any state with limited statute."

The Washington Code provides as follows, Remington's Revised Statutes of Washington, Sec. 157:

> "Within six years:
>
> "1. An action upon a judgment or decree of any court of the United States, or of any state or territory within the United States, or of any territory or possession of the United States outside the boundaries thereof, or of any extraterritorial court of the United States * * *."

It is therefore our contention that the cause of action has been extinguished in both states and that neither the law of the forum nor the law of the place gives any right to the government to proceed.

We further contend that Rule 30 of the Local rules of the United States District Court prohibit the action. We quote in part therefrom:

> "Rule 30. Enforcing Judgment.
>
> "Except where regulated by Acts of Conress or the Federal Rules of Civil Procedure, the party recovering judgment in any cause in the district court shall be entitled to similar remedies upon the same by execution, or otherwise, to reach the property of the judgment debtor as are provided at the time in like causes by the laws of the State of Washington; and the state laws in relation to executions, sales, exemptions, rights of purchasers, *rights of judgment creditors* and judgment debtors, redemptions, liens of judgments and proceedings supplementary to such proceedings, existing at the time the remedy is sought, subject to the Acts of Congress and said Federal Rules of Civil Procedure, are adopted as rules of this court; and the United

States Marshal of this District shall conform his proceedings thereto;" (Italics ours)

It can be readily seen therefore that the United States Court is as limited in its jurisdiction as any State Court by its own rules and the Congressional mandate.

There are certain other laws of Washington which we believe are applicable and the court's construction of them is best expressed in the following case:

> "In Ch. 39, Laws of 1897, p. 52, relating to the duration of judgments, referring to sections of Remington's Compiled Statutes, we read:
>
> " '§459. After the expiration of six years from the rendition of any judgment it shall cease to be a lien or charge against the estate or person of the judgment debtor.
>
> " '§460. No suit, action or other proceedings shall ever be had on any judgment rendered in the state of Washington by which the lien or duration of such judgment, claim or demand, shall be extended or continued in force for any greater or longer period than six years from the date of the entry of the original judgment.'
>
> "This statute, we think, is not a mere statute of limitation affecting a remedy only. It is more than that. It not only makes a judgment cease to be a 'charge against the person or estate of the judgment debtor' after six years from the rendering of the judgment, but also in terms expressly takes away all right of renewal of or action upon the judgment looking to the continuation of its duration or that of the demand on which it rests, for a longer period than six years from the date of its rendition. It does not tell us when an action upon a judgment may be

commenced. It simply tells us that no judgment can be rendered extending the period of duration of a judgment, or of the claim or demand upon which it rests, beyond the period of six years following its rendition. We have given full force and effect to this statute. *Burman v. Douglas*, 78 Wash. 394, 139 Pac. 41; *Ball v. Bussell*, 119 Wash. 206, 205 Pac. 423. We note that in *Burman v. Douglas*, this statute is referred to as 'one of limitation.' A critical reading of that decision, however, will show that the question of whether it is an ordinary statute of limitation against the commencement of an action, or a statute taking away a right of action, was not considered. We think that expression in that decision should not be regarded as of any controlling force in our present inquiry.

"In *Ball v. Bussell, supra*, we held in effect that the statute took away all right of action for recovery upon a judgment in so far as such recovery could be made effectual beyond the period of six years from the rendition of the judgment."

Roche v. McDonald, 136 Wash. 322, 239 Pac. 1015, 44 A.L.R. 447.

It has been held that the duration of a lien of judgment rendered in Federal Court is controlled by State Law.

U. S. v. Harpootlian, 24 F.(2d) 646.

The Supreme Court of the United States On the Statute of Limitations.

The Supreme Court of the United States has made some pertinent observations in connection with the statute of limitations when the statutes of the

forum extinguished the cause of action. These cases are not cases involving the government's right to a cause of action, but indicate that when a cause of action is extinguished, there is no right to a remedy.

This was first decided in the case of *M'Elmoyle v. Cohen*, 13 Pet. 312, 10 L. ed. 177. This was followed later in the case of *Bank of Alabama v. Dalton*, which was an action brought on an Alabama judgment in the courts of Mississippi. The court, referring the plea of statute of limitation stated:

> "That acts of limitation furnish rules of decision, and are equally binding on the Federal courts as they are on State courts, is not open to controversy; the question presented is one of legislative power, and not practice.
>
> "In administering justice to enforce contracts and judgments, the States of this Union act independently of each other, and their courts are governed by the laws and municipal regulations of that State where a remedy is sought, unless they are controlled by the Constitution of the United States, or by laws enacted under its authority. And one question standing in advance of others is, whether the courts of Mississippi stood thus controlled, and were bound to reject the defense set up under the State law, because, by the supreme laws of the Union, it could not be allowed.
>
> "The Constitution declares, that 'full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every State. And the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved,

and the effect thereof.' No other part of the Constitution bears on the subject."

The Bank of the State of Alabama v. Dalton, 9 How. 522, 13 L. ed. 242.

This was later followed in the case of *Bacon v. Howard* which was a suit brought on a Mississippi judgment in the Texas court. Texas had a statute of limitations on judgments. The court ruled as follows:

"The Republic of Texas had the power to prescribe such rules to its own courts as best suited their condition, and their policy cannot be mistaken. Its accession to the Union had no effect to annul its Limitation Laws, or revive rights of action prescribed by its previous laws as an independent State. It is true, any legislation which denied that full faith and credit which the Constitution of the United States requires to be given to the judicial proceedings of sister States would be *ipso facto* annulled after the annexation, on the 29th of December, 1845. Thereafter, the authenticity of a judgment in another State, and its effect, are to be tested by the Constitution of the United States and Acts of Congress. But rules of prescription remain, as before, in the full power of every State. There is no clause in the Constitution which restrains this right in each state to legislate upon the remedy in suits or judgments of other states, exclusive of all interference with their merits. The case of *McElmoyle v. Cohen*, 13 Pet. 312, leaves nothing further to be said on this subject."

Bacon v. Howard, 20 How. 22, 15 L. ed. 811.

The foregoing cases, we believe, set forth the proper rule.

See also the oft cited case of

Fink v. O'Neil, 106 U.S. 272, 27 L. ed. 196.

The purpose of such limitation is well expressed in the following quotation:

> "The real ground is a great principle of public policy, which belongs alike to all governments, that the public interests should not be prejudiced by the negligence of public officers, to whose care they are confided. Without undertaking to lay down any general rule as applicable to cases of this kind, we feel satisfied that when, as in this case, a statute which proposes only to regulate the mode of proceeding in suits, does not divest the public of any right, does not violate any principle of public policy; but on the contrary, makes provisions in accordance with the policy when the government has indicated by many acts of previous legislation, to conform to State laws, in giving to persons imprisoned under their execution the privilege of jail limits; we shall best carry into effect the legislative intent by construing the executions at the suit of the United States to be embraced within the Act of 1828."
>
> *U. S. v. Knight*, 14 Pet. 301, 10 L. ed. 465.

We believe all laws should receive a reasonable interpretation and the point is well stated in the following language:

> "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or any absurd consequences. And it will always be presumed that the Legislature intended exceptions to its language, which would avoid re-

sults of this character. The reason of the law in such cases, should prevail over its letter."

U. S. v. Kirby, 7 Wall. 482, 74 U.S. 482, 19 L. ed. 278.

We quote the foregoing as an apt formula to apply to the case at bar.

The Court's Construction of the Judgment of Imprisonment and Fine.

The District Court seemed to be of the opinion that because the penalty of fine had been reduced to a judgment, that makes a difference in the application of the rule.

We do not agree to this construction for the reason that it is founded upon a violation of law and represents the penalty involved therefor.

If any question is raised that this is a judgment and not a penalty, the case of *Farni v. Tesson*, 66 U.S. 309, 17 L. ed. 67, stating that an action for debt on bond is for penalty is in point.

Also:

"The term 'penalty' involves the idea of punishment and its character is not changed by the mode in which it is inflicted whether by a civil or a criminal prosecution."

U. S. v. Chouteau, 102 U.S. 603, 26 L. ed. 246.

U. S. v. Ulrici, 102 U.S. 612, 26 L. ed. 249; *Schick v. U. S.*, 195 U.S. 65, 49 L. ed. 99.

That there may be no question that the judgment of imprisonment and fine is still a penalty, we cite the following general rule:

"1. The legal operation and effect of a judg-

ment must be ascertained by a construction and interpretation of it. This presents a question of law for the court. Judgments must be construed as a whole, and so as to give effect to every word and part. The legal effect, rather than the mere language used, governs. In cases of ambiguity or doubt, the entire record may be examined and considered. Judgments are to have a reasonable intendment."

34 C. J. 504, Sec. 794.

The record shows that the action is based upon a criminal judgment for imprisonment and fine as shown by the indictment (Tr. 10) and the judgment (Tr. 24).

Courts have generally refused to enforce the penal, criminal or revenue laws of another state and the penal character if not changed by reducing the penalty to a judgment and then suing upon such judgment, and while a Court cannot go behind the judgment, it may ascertain whether the claim is for a penalty and therefore one which Court should not enforce.

34 C. J. 1107, Sec. 1573.

"The validity of a judgment, within the rule above mentioned, referring to judgments under penal statutes, must be tested by the law of the state where such judgment was rendered. * * *

"An action founded on a judgment of a sister state must be governed by the rules of pleading and practice prevailing where such action is brought subject to the qualification that the procedure obtaining in the latter state cannot impair the efficacy of a judgment of a sister state, or deny an adequate remedy for its enforcement."

34 C. J. 1107, Sec. 1574.

It is our opinion that in whatever form the government may have elected to proceed, it would still be an action for the collection of a penalty, and whether the action is based upon an original action, or upon a judgment, a search of the record should be made by the court to find the basis of the cause of action and determine its character. The record in the case, the Complaint (Tr. 2), the agreed Statement of Facts (Tr. 6), the Indictment (Tr. 10), the Verdict (Tr. 22), and the Judgment of Conviction (Tr. 24), indicate the action was a penal proceeding.

We, therefore, suggest that the District Court was in error in making a distinction in this case because of the form of the action. It was in the beginning and is now an action to collect a penalty.

The *Schodde* and *McCutcheon* Cases Are Not Applicable.

The court in its conclusions of Law felt that *Custer v. McCutcheon*, 283 U.S. 514, 75 L. ed. 1239, and *Schodde v. U. S.*, 69 F.(2d) 866, entitle the United States to Judgment. We do not agree that these cases bind the court.

In the first instance, we assert that the statutes of the United States forbidding actions for penalties and forfeitures after five years were not involved in either case, and they are therefor not in point.

In the second instance, the decision involved the Idaho limitation and it cannot be authority except upon such litigation. The Washington statute not only limits such actions, but extinguishes them and the court observed in its opinion: "The court is not bound by a statute of limitation unless it so indicates

by statute." It is our contention the Congress has limited the action of this character.

Again we assert as indicative of the Congressional Mandate, the statutory limitation on actions involving custom violations which reads:

> "Section 1621. Limitation of actions.—No suit or action to recover any *pecuniary penalty* or forfeiture of property accruing under the customs laws shall be instituted unless such suit or action is commenced within five years after the time when the alleged offense was discovered: Provided, That the time of the absence from the United States of the person subject to such penalty or forfeiture, or of any concealment or absence of the property, shall not be reckoned within this period of limitation. (June 17, 1930, c. 497, Title IV, §621, 46 Stat. 758; Aug. 5, 1935, c. 438, Title III, §306, 49 Stat. 527)"
>
> Vol. 6A F.C.A., p. 924, Title 19.

The case at bar involved violations of Custom Laws as shown by the indictment (Tr. 10, 17) and while the quoted statute is not exactly in point, yet it indicates that the Congress intended to limit actions to certain fixed periods.

We believe Rule 30 of Local Rules of the District Court also should be considered, as under this rule the District Court has bound itself to the laws of Washington unless otherwise regulated by Congress and it is our contention that the penalty and forfeiture statute does regulate it and forbid the action, and therefore the *Schodde* and *McCutcheon* cases should not be controlling or authority for the entry of a judgment against the appellant.

CONCLUSION

We have not discussed the full faith and credit clause of the Constitution because we do not think it pertinent. We have stressed the points that we think dispose of the case and have demonstrated that neither by the laws of the United States or the laws of Washington or California, is there a valid judgment, and we do not believe where the law of the place destroys the effectiveness of the judgment and the law of the forum denies a remedy, that the United States should be permitted to proceed in this action.

This case has more than passing significance. It involves the rights of many poor and indigent prisoners who at present and in the future will be subject to great financial peril throughout their lives if the government is permitted to proceed.

A defendant in the simplest misdemeanor case will find himself unable to engage in gainful occupation, because if he does so, the government can impose a penalty and visit upon him financial distress.

The defendant in this case was a pauper at the time of his conviction and it is to be noted the government took from him all of his property, the sum of Fifty-one and 35/100 ($51.35) Dollars (Tr. 8) and does not now claim that he concealed or withheld any funds or property on the execution of the Judgment.

A defendant who has had visited upon him a fine as the only penalty for his offense, if the fine were substantial, would not have any opportunity to rehabilitate himself and would in the average case suffer financial ruin.

Ordinarily, we associate a fine with a minor offense,

but it appears now that a fine on an indigent debtor is a continuing punishment. This has not been the philosophy of our government. The purposes of the government has been expressed in its welfare enactments for the relief of needy persons during the past decade. We believe the same rule should be applied to indigent prisoners.

To hold the defendant subject to the fine at this late date, would, it seems be a weighty punishment.

The government has limited the filing of indictments in all cases, save only capital crimes, to certain periods. To attempt the distinction that because the debt has been reduced to a judgment, it loses its character as a penalty, is a strained construction and will produce inequitable results.

We therefore submit that the government has no cause of action, not only by its own laws, but by the laws of the states in which it was prosecuted, but even assuming that these suggestions are overruled, the facts and circumstances should be considered, and the government not be permitted to revisit on a defendant at a late date, penalties for a violation long since paid for.

The appellants respectfully submit: That the Judgment of the lower court should be reversed and the action should be dismissed.

Respectfully submitted,

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